IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27/12/2002

CORAM

THE HONOURABLE MR.JUSTICE C.NAGAPPAN

SECOND APPEAL NO.1428 of 1990

1.K.Krishnan

2.K.Varadan ... Appellants/
Plaintiffs

-Vs-

1.S.Mari Naicker

2.Kannammal ... Respondents/
Defendants

Appeal under Section 100 of Civil Procedure Code against the judgment and decree, dated 13.11.1989, rendered in A.S.No.15 of 1989 on the file of District Judge, Chingleput, reversing the judgment and decree, dated 9.1.1989, made in O.S.No.333 of 1982 on the file of District Munsif, Chingleput.

!For Appellants .. Mr.P.Sukumar

^For Respondents .. Mr.V.Nicholas for R-1

:JUDGMENT

This second appeal is preferred against the judgment and decree, dated 13.11.1989, rendered in A.S.No.15 of 1989 on the file of District Judge, Chengalpattu. The plaintiffs are the appellants in the second appeal.

2. The case of the plaintiffs is that they are brothers undivided in status. The schedule mentioned properties have been purchased by their parents Kanniappa Naicker and Alamelu Ammal under three registered sale deeds, dated 4.11.1931, 29.11.1938 and 17.3.1939, from the first defendant's father Vedagiri Naicker for valuable consideration and they took possession of the properties and enjoyed the same. Kanniappa Naicker died in the year 1966 and Alamelu Ammal was managing the suit properties by paying kist through her brother's son, namely, the first defendant herein. Since the plaintiffs and their mother Alamelu Ammal were residing at Madras, the first defendant was requested to take care of the schedule mentioned properties and he was

cultivating the lands on behalf of the plaintiffs and their parents. The second defendant is the sister of the plaintiffs. Alamelu Ammal executed a Registered Will, dated 12.4.1977, bequeathing the properties in favour of the plaintiffs and she died on 10.11.1981. The Will came into effect and the plaintiffs have become the absolute owners of the properties. The plaintiffs demanded possession of the lands in the month of Thai, 1981 and issued notice, dated 31.1.1981, to the first defendant to hand over possession. There was no reply. The first defendant has been evading to deliver possession. The plaintiffs sent another lawyer's notice, dated 29.12.1981 and the first defendant sent a reply on 18.1.1982 setting up a hostile title. Hence the plaintiffs have filed the suit for declaration of their title to the schedule mentioned suit properties and for a direction to the first defendant to deliver possession of the suit properties and for future profits.

3. The first defendant in his written statement and additional written statement has contended thus. The suit properties are not ancestral joint family properties as alleged by the plaintiffs and they have not been described correctly. The plaintiffs' mother Alamelu Ammal is the elder sister of the first defendant's father Shanmugha Naicker. The allegation that the suit properties were purchased by Kanniappa Naicker and Alamelu Ammal from the first defendant's father under three registered sale deeds is false. Kanniappa Naicker and Alamelu Ammal were permanent residents of Old Washermanpet at Madras and they did not purchase properties in the suit village. In any event, the three sale deeds alleged by the plaintiffs never came into force and acted upon. The plaintiffs in their notice, dated 31.1.1981, had claimed that the house property contained in 'A' schedule is in permissive possession of the first defendant and the lands mentioned in the notice have been leased to the first defendant by their mother Alamelu Ammal on 'waram' basis and the first defendant was giving 'waram' to their mother. But in the plaint the plaintiffs have alleged that Alamelu Ammal was herself managing the properties by paying kist through the first defendant and the first defendant was a caretaker. The plaintiffs have no definite case and the alleged Will by Alamelu Ammal is denied.
The suit properties are ancestral joint family properties of the first defendant and his father Shanmugha Naicker. The elder brother of the first defendant died four years back and the mother of the first defendant is alive. The first defendant is residing in the suit house with his family, along with mother. The allegation that the first defendant is in permissive possession in respect of the suit house is false. Neither Kanniappa Naicker nor Alamelu Ammal ever attempted to sub-divide the lands in pursuance of the alleged sale deeds and obtain separate patta in their names. Though the sale alleged by the plaintiffs is more than forty five years ago, the patta to the suit properties were not transferred in the name of Kanniappa Naicker or Alamelu Ammal. Patta to the suit lands stood in the name of father of the first defendant and afterwards it stands in the name of the first defendant. Kist is paid by them only. The first defendant is in possession and enjoyment of the suit properties in his own right and cultivating the same by paying kist. The house stands registered in the name of the first defendant only and the house tax is being paid by him. The father of the first defendant and the

first defendant have been in possession and enjoyment of the suit properties in their own right and they have acquired title to the suit properties by adverse possession and prescription also. The first defendant's mother has installed a pump-set to the Well and service connection stands in her name. The first defendant has prescribed title by adverse possession and the suit is also barred by limitation.

4. The second defendant in her written statement has stated that she is not claiming any right over the schedule mentioned properties and the plaintiffs are the absolute owners by Registered Will, dated 12.4.1977 and entitled to recover possession from the first defendant.

5. On the above pleadings, the District Munsif, Chengalpattu, framed twelve issues and on a consideration of the oral and documentary evidence, decreed the suit as prayed for. Aggrieved by the same, the first defendant preferred appeal in A.S.No.15 of 1989 on the file of District Judge, Chengalpattu and the learned District Judge concluded that the plaintiffs are the owners of the suit properties and even then they cannot recover possession since the first defendant has prescribed title by adverse possession and allowed the appeal. Aggrieved by the same, the plaintiffs have preferred this second appeal. For the sake of convenience, the parties are described as arrayed in the suit, in this Judgment.

6. At the time of admission of the second appeal, the following substantial question of law has been framed by this Court.
"Whether the lower appellate Court is right in holding that the 1st defendant/ 1st respondent had established his right to the suit properties by adverse possession over looking the oral evidence and documentary evidence of the plaintiff merely by relying upon kist receipts and electricity receipts."

7. The suit properties consist of schedule 'A' and schedule 'B' and mainly they are agricultural lands. The plaintiffs claim title to the suit properties on the ground that their parents Kanniappa Naicker and Alamelu Ammal purchased them under three registered sale deeds, dated 4.11.1931, 29.11.1938 and 17.3.1939 from the first defendant' s father Vedagiri Naicker. Though the first defendant contended that the sale deeds never came into force, both the courts below have concurrently found that the plaintiffs are owners of the suit properties by virtue of the above sale deeds and that finding has become final since not appealed against.

8. The plaintiffs have challenged the finding of the lower appellate Court that the first defendant prescribed title by adverse possession to the suit properties. The learned counsel for the appellants contended that once title is established on the basis of relevant documents, unless defendant proves adverse possession for the prescriptive period, plaintiffs cannot be non suited and relied on the decision of the Apex Court in INDIRA vs. ARUMUGAM AND ANOTHER ((1998) 1 SCC 614) and in the same way, the other two decisions cited by the learned counsel for the appellants (i) ANNASAHEB BAPUSAHEB PATIL AND OTHERS vs. BALWANT ALIAS BALASAHEB BABUSAHEB PATIL (DEAD) BY LRS. & Heirs, etc. (AIR 1995 SC 895) and (ii) Dr.MAHESH CHAND SHARMA v.

Smt.RAJ KUMARI SHARMA AND OTHERS (AIR 1996 SC 869) for the proposition that the person who claims prescription of title by adverse possession must plead and establish all the facts necessary to establish his adverse possession are all well settled law.

9. In the present case, as regards analysis of the evidence, the appellate Judge had devoted a more detailed and closer examination of both oral and documentary evidence compared to the learned trial Judge. There is inconsistency in the case of the plaintiffs with regard to the character of possession of the suit properties by the first defendant. In the notice, dated 31.1.1981, which is marked as Ex.B-1 , the plaintiffs have stated that the first defendant is a 'waramthar' of the plaintiffs and in the plaint it is stated that the first defendant has been requested to take care of the suit properties and also to cultivate them on their behalf. Exs.A-1 to A-3 are the sale deeds relating to the suit properties. Ex.A-4 is the suit notice, dated 2 9 .12.1981 and Ex.A-5 is the reply sent by the first defendant denying the title of the plaintiffs to the suit properties. Ex.A-6 is the Will, dated 12.4.1977, in which the suit properties were bequeathed to the plaintiffs by their mother. Ex.A-7 is the certificate issued by Karnam with regard to some items of the suit properties and Ex.A-8 is the Chitta extract for fasli 1396. Ex.A-10 is the kist receipt for fasli 1381. The lower appellate court is correct in concluding that Ex.A-7 is only a certificate and not the patta. Admittedly, the suit properties are comprised in patta No.572 and it does not stand either in the name of the plaintiffs or in the name of their parents. The only kist receipt Ex.A-10, filed by the plaintiffs, is

not shown to be related to the suit properties and is also doubtful as to whether the mother of the plaintiffs had paid kist in it as claimed. In short, the plaintiffs have not adduced any documentary evidence to show that they have paid kist to the suit properties. Insofar as the oral testimony is concerned, the first plaintiff has examined himself as P.W.1 and he himself has admitted in the crossexamination that the patta is standing in the name of the first defendant for more than twenty years. The lower appellate court has rightly disbelieved the testimony of P.W.2 on the ground that he does not know as to where the suit properties are situated.

10. On the contrary, the first defendant has examined himself as D.W.1 and has categorically stated that his father was enjoying the suit properties in patta No.572 by paying kist and after his death, he is in enjoyment of the suit properties and the patta stands in their name throughout. Ex.B-3 is patta bearing No.572 relating to the suit properties and it stands in the name of the father of the first defendant. After his death, patta has been transferred in the name of the first defendant and his brother Balakrishnan and Ex.B-4 is the patta book showing them as pattadars. Exs.B-5 to B-31 are kist receipts from the year 1958 to 1986 standing in the name of the father of the first defendant, his wife and later in the name of the first defendant and his brother Balakrishnan. Balakrishnan has expired four years prior to the filing of written statement. It is the further case of the first defendant that the electricity connection with regard to the electric motor installed in the Well stands in the name of his mother and the electricity charges are being paid by them. Exs.B-37 to B-56 are the demand

notices and Exs.B-57 to B-81 are receipts evidencing payment of electricity charges. In fact, P.W.1 himself has admitted in the cross-examination that there is an electricity connection to the Well situated in the suit properties but pleads ignorance about the person on whose name it stands. The first defendant has let in oral and documentary evidence to show that his father and later himself are in continuous enjoyment of the suit properties as their own and the real owners, namely, the plaintiffs, did not take any step to assert their right and to interrupt the running of the period of limitation. I am in agreement with the view expressed by K.P.Sivasubramaniam,J in THANGAMANI vs. SANTHIAGU ((2000) 3 M.L.J. 589) that it was not necessary that the adverse possession should be brought to the knowledge of the person against whom it is claimed and that it was sufficient that possession should be open and without any concealment so that the person against whom the time was running was aware of what was happening. The other decision cited by the learned counsel for the respondent is SADASIVA GOUNDER AND ANOTHER v. PURUSHOTHAMAN ((2000) 3 M.L.J. 785), in which K.Sampath,J has held that 'animus' in the legal parlance would mean mind, design, will, intention, disposition and to claim with regard to possession, the term is animus possidendi, which means the intention of possession and the person claiming adverse possession must intend in his mind to possess a property as his own and it does not mean that he must be conscious that the property belongs to somebody else and all that is required by the term 'animus' in the context of adverse possession is that the person must have intention to possess the property as his own and I agree with the above view of the learned Judge.

11. In the present case, the appellate Court had rendered a finding and held that the first defendant had let in oral and documentary evidence to show that he is in possession and enjoyment of the suit properties as his own. From the evidence available on record, I am also inclined to hold that the first defendant had been in open and continuous possession asserting title in himself as against the whole world and that the plaintiffs or their parents as predecessors in title had not taken any steps to exercise due vigilance in order to arrest time running against them.
12. In the result, I do not find any grounds to interfere with the judgment of the appellate court and the second appeal is dismissed. No costs.

Index: Yes.
Internet: Yes.

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To
1. The District Judge, Chengalpattu.
2. The District Munsif, Chengalpattu.
3. The Section Officer,
V.R.Section, High Court, Madras.